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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/010,965	12/07/2001	Paul J. Datta	KCC-16,986	5676
45736 7590 04/03/2008 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP ONE METROPOLITAN SQUARE SUITE 2600 ST. LOUIS, MO 63102				
EXAMINER				
REICHEL, KARIN M				
ART UNIT		PAPER NUMBER		
3761				
NOTIFICATION DATE		DELIVERY MODE		
04/03/2008		ELECTRONIC		

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL J. DATTA, KRISTI JO BRYANT, TIMOTHY J. BLENKE,
STEPHEN C. BAUMGARTNER, JULIE A. MOSER, BARBARA A.
GOSSEN, KATE MARGUERITE HANCOCK-COOKE, MARK G.
EVERSON, and PETER S. LORTSCHER

Appeal 2008-1107
Application 10/010,965
Technology Center 3700

Decided: April 1, 2008

Before DONALD E. ADAMS, ERIC GRIMES, and JEFFREY N.
FREDMAN, *Administrative Patent Judges*.

FREDMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to an absorbent article which the Examiner has rejected as anticipated and/or obvious. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

Background

“Absorbent articles such as diapers, training pants or incontinence garments desirably provide a close, comfortable fit about the wearer and contain body exudates” (Spec. 2). The Specification teaches that “conventional diapers are not easily fastened about and removed from the wearer after use without undesirably soiling the caregiver. Further, such conventional diapers are not provided in a pant-like, prefastened configuration” (Spec. 3). According to the Specification, the “invention is directed to a pant-like, refastenable disposable absorbent article having side seams which include a front ear passively bonded to a back ear, wherein the front ear is releasable from the back ear causing minimal or no tearing or damaging the back ear” (Spec. 5).

Statement of the Case

The Claims

Claims 1-12 and 40-43 are on appeal. We will focus on claims 1 and 40 which are representative and read as follows:

1. An absorbent article comprising:
 - a front waist region, a back waist region, and a crotch region extending between the waist regions,
 - a first ear panel formed of a first material extending from a first edge portion of the front waist region;
 - a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region, the second material having a basis weight greater than a basis weight of the first material; and
 - at least one manually tearable passive bond connecting the first ear panel and the second ear panel together.

40. An absorbent article comprising:
a front waist region, a back waist region, and a crotch region extending between the waist regions,
a first ear panel formed of a first material extending from a first edge portion of the front waist region;
a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region; and
at least one manually tearable passive bond connecting the first ear panel and the second ear panel together,
wherein in disconnecting the first ear panel from the second ear panel, the first ear panel is damaged more than the second ear panel.

The prior art

The Examiner relies on the following prior art references to show unpatentability:

Johnson	US 5,622,589	Apr. 22, 1997
McNichols	US 6,036,805	Mar. 14, 2000
Morman	US 5,226,992	Jul. 13, 1993

The issues

The rejections as presented by the Examiner are as follows:

Claims 1, 8, and 40-43 stand rejected as either anticipated under 35 U.S.C. § 102(b), or as being obvious under 35 U.S.C. § 103(a), over Johnson.

Claims 2-7 stand rejected under 35 U.S.C. § 103(a), as being obvious over Johnson.

Claims 9-12 stand rejected under 35 U.S.C. § 103(a), as being obvious over Johnson, McNichols, and Morman.

35 U.S.C. § 102(b)/103(a) rejection over Johnson

Appellants argue that

Johnson et al. does not teach or suggest: (a) a second ear panel formed of a second material different from the first ear panel material; (b) the second material having a basis weight greater than a basis weight of the first material; and/or (c) at least one manually tearable passive bond connecting the first ear panel and the second ear panel together

(App. Br. 7). Appellants contend that “first member 200 and second member 202 are made of the same material regardless of whether barrier member 205 is connected to or integrated with one of first member 200 and second member 202” (*id.* at 8).

The Examiner responds to Appellants’ arguments, noting “the teachings at the portions of Johnson cited *supra* (e.g., col. 6, lines 29-30[]) clearly discloses that the first member and second member may be separate members, i.e. not of the same web” (Ans. 11). The Examiner also argues that “since one of the ear panels includes element 205 and one does not . . . the basis weight of the one ear panel including element 205 is or obviously is greater than the other ear panel which does not include 205” (Ans. 7-8).

The Examiner also argues that the “elements 200, 202 have a tensile strength such that 205 will tear before 200, 202 do . . . Therefore, since that one of the ear panels is not damaged or its tensile strength is not negatively affected, such ear panel is affected or damaged less than the other ear panel” (Ans. 8).

In view of these conflicting positions, we frame the obviousness issue before us as follows:

Does Johnson teach or suggest ear panels which are formed of different materials, have different basis weights and which differ in their resistance to tearing?

Findings of Fact

1. Johnson teaches training pants which “comprise a chassis 14, an absorbent assembly 22, and at least one flangeless seam 10” (Johnson 3:48-50).
2. Johnson teaches a “front portion 56 and the rear portion 58 of the chassis 14 being joined together” and Johnson shows a crotch region extended between the waist regions (Johnson 4:3-6, fig. 2).
3. Johnson teaches ear panels 200 and 202 with “a web 400 having longitudinal side edges 410 that will be processed into disposable article 15 having first members 200 and second members 202 to be joined” (Johnson 5:27-29).
4. Johnson teaches that “the barrier member 205 may comprise an element or material that is unitary or integrated with at least a portion of the first member 200” (Johnson 7:6-9). Johnson discloses ears in which ear 200 with material 205 is present at one end of the article and ear 202 is present at the other end of the article but material 205 does not extend all the way to the edge (*see* Johnson, fig. 9D).
5. Johnson teaches that “the composition of the barrier member 205 will be limited only by the particular joining means 300 which will be used and the strength characteristics necessary to provide an acceptable seam” (Johnson 7:24-27).

6. Johnson teaches a variety of barrier members including “KEVLAR, NYLON, polypropylene films, polyethylene films, scrim, woven materials or laminates of any [of] these or any other suitable materials” (Johnson 7:14-16).

7. Johnson teaches that “to open the flangeless seam 10, the barrier member 205 is preferably torn or separated” (Johnson 9:18-19). Johnson further prefers that “the barrier member 205 comprises a nonwoven material that will tear with less force than is needed to separate the barrier member 205 from either the proximal portion 210 or the distal portion 212” (Johnson 9:30-32).

Discussion

We interpret the claims using the broadest reasonable interpretation. *See, e.g., In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000) (“[D]uring examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification.”). We agree with the Examiner that Johnson teaches absorbent articles (FF 1-2) with ear panels (FF 3). In considering whether the first and second ear panels of Johnson are composed of the same or different materials, we must first interpret what elements may constitute the ear panels and then determine which elements in Johnson satisfy these ear panel requirements.

Appellants’ Specification defines “ear” as “any material that extends laterally beyond the crotch area at the front or rear of the absorbent article” (Spec. 8:11-12). In figure 9D, Johnson shows two ears, 200 and 202, which extend laterally beyond the crotch area where ear 200 also has material 205 present laterally beyond the crotch area (FF 4). Even if we agree with the

Examiner's claim interpretation that the combination of materials 202 and 205 may represent a second material (*see* Ans. 6), the combination still does not satisfy the element of claim 1 for "a second ear panel formed of a second material different from the first material extending from a first edge portion of the back waist region" (Claim 1). Barrier material 205 of Johnson does not extend "from a first edge portion of the back waist region" as illustrated in figure 9 of Johnson (*see* FF 4). Barrier material 205 begins at a point beyond the edge of the back waist region (FF 4).

That is, the second ear panel – the part of Johnson's article that "extend[s] from a first edge portion of the back waist region – is made of the same material as the first ear panel. The difference between the ear panels in Johnson's article is that the rear ear panel has an additional component attached to part of the ear panel, not that the front and rear ear panels are made of different materials, as required by claim 1.

Consequently, since we do not find that the materials 200 and 202 in the ear panels differ in composition, we conclude that the basis weight is the same, so that Johnson also does not meet the claim requirement "the second material having a basis weight greater than a basis weight of the first material" (Claim 1).

With regard to the issue of obviousness, we recognize that "the [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ". *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, (2007). However, the court also noted regarding the obviousness analysis "[t]o

facilitate review, this analysis should be made explicit.” *Id.* at 1741. In the instant case, no specific teachings have been disclosed to suggest forming ear panels from first and second different materials which extend from a first edge portion as required by the claims. Additionally, no reasons or inferences on why such different materials would have been desirable are discussed in the Answer or disclosed in Johnson. The rejection provides no “apparent reason to combine the known elements in the fashion claimed.” *KSR*, 127 S. Ct. at 1741.

We therefore reverse the rejection of claim 1 as anticipated or obvious over Johnson. Having reversed the rejection of claim 1, we also reverse the rejections of the claims 2-12 and 40-43 for the same reasons, because those claims also require ear panels formed of different materials that extend from a first edge portion, and again, the additional references cited by the Examiner do not remedy the deficiencies of Johnson.

CONCLUSION

In summary, we reverse the rejection of claims 1-12 and 40-43 under 35 U.S.C. § 102(b) and 35 U.S.C. § 103(a).

REVERSED

saj

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